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Michael Bryan
University of Mebourne

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MICHAEL BRYAN*

I Introduction

The quotation attributed to Socrates that 'I cannot teach anybody anything; I can only make them think' comes readily to mind when one turns the pages of Denis Ong's trusts textbook, *Trusts Law in Australia*.[1] Denis held strong views on the contentious questions of trusts law, often at variance with received professional and academic opinion.[2] But his primary aim in presenting occasionally iconoclastic analyses of classic trusts law authorities was to encourage students to read (and reread) the cases and statutes carefully for themselves, and then to work out their own answers to the hard questions. To this end, the student was supplied with liberal extracts from judgments and statutory provisions were set out in full. References to secondary literature were scarce. Academic theorising, for example unjust enrichment analyses of equitable doctrine, or contemporary Hohfeld-derived 'rights' approaches, was wholly absent. Ironically perhaps, in view of his disdain for secondary sources of law, Denis became in his later years a significant secondary authority, being respected by the judiciary for his lucid and accurate exposition of complex doctrine.[3]

Denis Ong was an opinionated scholar, in the best sense of that word, and his written opinions were emphasised by frequent italicisation of words and phrases in judgments that he considered critical to his analysis. *Trusts Law in Australia* is a compendium of original thinking about trusts law. But it also conveys, more vigorously than any other Australian textbook on trusts, the author's passion for teaching the subject.

The aim of this paper is to illustrate Denis Ong's facility for identifying the hard questions of trusts law with reference to his analysis, in *Trusts Law in Australia*, of a settlor's intention to create a trust. As we will see, this is not a simple matter of ascertaining, from writing or other evidence, that an intention to create a trust has been manifested.

* Emeritus Professor of Law, University of Melbourne.

1 (Federation Press, 5th ed, 2018) ('*TLIA*').
2 See, for example, his discussion of the Quistclose trust: *TLIA* (n 1) 12-31.
3 *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 396 ALR 27, [436] (Derrington J)

A court may have to go further in some cases and consider whether the settlor possessed a genuine intention to create a trust, or whether the intention is, in some sense, counterfeit. This may be because the putative trust is a sham. Even if it is not a sham, there may be other reasons why the arrangement put in place by a settlor cannot be characterised as a trust. Recent decisions, considered later in this paper, have highlighted the distinction between true and counterfeit intention.

II Byrnes v Kendle[4]

A. *The case*

The decision of the High Court of Australia in *Byrnes v Kendle* is the leading modern authority on ascertaining a settlor's intention to create a trust. Mr Kendle had separated from his wife, Mrs Byrnes. He was the sole registered proprietor of a property and, some years prior to the separation, he had executed a deed declaring that he 'stands possessed of and holds one undivided half interest in the Property as tenant in common upon trust for [Mrs Byrnes] absolutely.' When that property was later sold, and another property purchased with the proceeds, a second deed was executed in substantially identical terms to the earlier deed. Mr Kendle allowed his son from a previous relationship to occupy the property rent-free. Upon sale of the property Mrs Byrnes claimed that she was entitled, as beneficiary, to half the proceeds of sale of the property, as well as to an account for half the rent the son should have paid in respect of his occupation, after an allowance had been made to Mr Kendle for mortgage and other payments he had made.

Mr Kendle argued, in contradiction to the express terms of the deed, that he did not intend to hold the property on trust for Mrs Byrnes. He stated that his purpose in signing the trust deed was to acknowledge that, upon eventual sale of the property, half of the net proceeds would belong to his wife. The submission was unanimously rejected by the High Court which held that the deed provided objective evidence of Mr Kendle's intention to create a trust. That evidence could not be displaced by Mr Kendle's statement, which was in any case inadmissible, as to his subjective intention at the time of signing the deed. Heydon and Crennan JJ summarised the applicable principle:

> The authorities establish that in relation to trusts, as in relation to contracts, the search for 'intention' is only a search for the intention as revealed in the words the parties used, amplified by facts known to both parties… [S]ubjective intention is irrelevant both to the question of whether a trust exists and to the question of what its terms are.[5]

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4 (2011) 243 CLR 253.

5 Ibid 286 [105], 290 [115] (Heydon and Crennan JJ).

In reaching this conclusion the High Court distinguished its earlier decision of *Commissioner of Stamp Duties v Jolliffe*.[6] *Jolliffe* concerned s12 of the first schedule of the *Queensland Government Savings Bank Act* 1916 (Qld) enacting that no person was permitted to have more than one account in Queensland Savings Bank. The provision did not, however, prevent a person from opening additional trust accounts at the bank in his own name. There was also a limit on the interest payable on an account. Mr Jolliffe opened a savings account at the Bank, signing a statement that he was the 'bona fide trustee of [his wife] Mrs Hanna Jolliffe.' A majority of the High Court, Isaacs J dissenting, upheld the finding of the trial judge that Mr Jolliffe did not intend to constitute himself trustee of the money deposited in the account. The High Court decision appeared to be authority for the proposition that an express trust will not be recognised if it contradicts the subjective (or 'real') intention of the settlor.

In *Byrnes v Kendle* the dissenting judgment of Isaacs J in *Jolliffe*, who held that parol evidence of the settlor's 'secret intention' could not override the formal declaration of trust, was preferred to that of the majority.[7] Alternatively, *Jolliffe* was distinguished on the ground that the High Court in that case was only concerned with a narrow submission, rejected by the majority, that the 1916 Act created a 'statutory trust' over an account which could not be defeated by the account holder's averment that there was no trust.[8]

B. *Ong on Byrnes v Kendle*

Denis Ong considered the reasoning, if not the result, in *Byrnes v Kendle* to be highly problematic. The High Court's analysis of *Jolliffe* came in for special censure.[9] Much of his forensic dissection of the judgments need not concern us.[10] But he raised one question about the case which deserves closer examination. 'A particularly puzzling aspect of *Byrnes v Kendle*', he remarked, 'is the High Court's conclusion that the putative declaration of trust in that case was *not* a *sham*.'[11]. Mr Kendle's argument was that, in signing the putative declaration of trust, he had not intended to declare himself trustee of one undivided half interest in the relevant property, but instead intended simply to

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6 (1920) 28 CLR 178 ('*Joliffe*').

7 (2011) 243 CLR 253, 262 [15]-[16] (French CJ), 290-1 [116] (Heydon and Crennan JJ).

8 Ibid 276-7 [63] (Gummow and Hayne JJ).

9 Cf the remark, *TLIA* (n 1) 89, that the analysis of *Jolliffe* by Heydon and Crennan JJ, (2011) 243 CLR 253, 290 [116], is 'less than unavoidably instructive'.

10 As in many cases of forensic demolition of judicial reasoning, accuracy sometimes suffers collateral damage. French CJ is stated (*TLIA* (n 1) 88) to have asserted that *Jolliffe* was a case 'about a sham trust'. But French CJ says no such thing. He noted (2011) 243 CLR 253, 263 [17] that the 18th edition of *Lewin on Trusts* analyses *Jolliffe* as a case on sham trusts but he nowhere expresses approval for the *Lewin* analysis.

11 *TLIA* (n 1) 90 (emphasis in original).

acknowledge that, upon eventual sale of the property, half the proceeds were to be paid to Mrs Byrnes. If a legal arrangement is alleged to be a sham, it is accepted that evidence of the subjective intention of the creator of the arrangement is admissible to determine the arrangement's true legal character. Why, then, was Mr Kendle denied the opportunity to demonstrate that the so-called trust was a sham; and that the deed was in substance, if not in form, an acknowledgement of an agreement to divide the proceeds of sale of the property between himself and Mrs Byrnes?

Ong's answer to his own question was somewhat casuistical. After setting out the authorities on sham trusts, which will be examined in the next section of this article, he concluded, applying the ratio of *Byrnes v Kendle*, that an intention to create a trust must be determined objectively: it 'depends on whether or not an *objective* observer of the declaration and of the circumstances surrounding it would have concluded that the declarant had so intended.'[12] He went on:

> The fact that the declarant had not also *subjectively* intended to create a trust would not prevent the creation of a trust. However, there would nevertheless be no trust created if there is proof that the declarant, in making the purported declaration of trust, had *subjectively* intended *not* to create a trust, as distinct from merely not having subjectively intended to create a trust.[13]

In this passage Ong drew an analytically difficult distinction between not subjectively intending to create a trust, which will nonetheless result in the recognition of a trust if there is sufficient objective evidence of an intention to create it, and subjectively intending *not* to create a trust which, if proved, will establish that any purported trust is a sham. The distinction is said to determine the admissibility of evidence of subjective intention. The simple point made in the next section of this article is that the difference between a true intention to create a trust and a sham is not as convoluted as this passage suggests. The distinction is easy to state, if not necessarily to apply. The real 'hard question', which Ong lightly touches upon towards the end of his analysis of *Byrnes v Kendle*, is the question of characterisation: how do we determine whether an arrangement labelled as a trust really is a trust, and not some other arrangement affecting rights in property? Part four of this paper examines recent judicial answers to this question.

III The Legal Concept of Sham

Although sham trusts have recently attracted a great deal of judicial and academic analysis, a basic point must be made at the outset: the concept

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12 *TLIA* (n 1) 92 (emphasis in original).

13 Ibid (emphasis in original) (citations omitted).

of sham is not confined to trusts law.[14] In the leading English authority on shams, *Snook v London & West Riding Investments Ltd*[15] the issue was whether a document created a genuine hire-purchase arrangement, or alternatively was ' a dressed-up arrangement for a loan on the security of a car.'[16] The sham doctrine has also been applied to leases, mortgages, loan contracts, gifts and contracts for services, to name only the most common shamming transactions.[17] In *Snook* Diplock LJ stated that a sham:

> means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create…[A]ll the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.[18]

A second basic point is that what is a sham is not the trust, or other legal structure, but the acts or documents which purport to establish the structure.[19] If, in a legal context, we say that a partnership is a sham, it is the deed of partnership which constitutes the sham, assuming that it gives the appearance of creating the mutual rights and obligations of co-partners which do not in reality exist, rather than the partnership purportedly created by the deed. A finding that the deed of partnership is a sham will naturally result in the partnership itself being replaced by a legal arrangement giving effect to the actual rights and duties that are found to subsist between the self-styled partners. The partnership is not so much void as non-existent.

Australian law applies this definition of a sham, placing emphasis on one aspect of Diplock LJ's definition: the essence of shamming is an intent to deceive third parties or the court. In *Raftland Pty Ltd v Commissioner of Taxation* Gleeson CJ, Gummow and Crennan JJ stated that a sham indicated 'deliberate deception' amounting to fraud and, consequently, caution should be exercised in describing a transaction as a sham.[20]

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14 Matthew Conaglen, 'Sham Trusts' (2008) 67(1) *Cambridge Law Journal* 176, 178.

15 [1967] 2 QB 786 (Court of Appeal) (*'Snook v London'*).

16 Ibid 803.

17 For the application of the sham doctrine to employment contracts, see *ZG Operations Australia Pty Ltd v Jamsek* (2022) 96 ALJR 144, 157 [62] (Kiefel CJ, Keane & Edelman JJ): 'In Australia, claims of sham cannot be made by stealth under the obscurantist guise of a search for the 'reality' of the situation.'

18 *Snook v London* (n 15) 802.

19 *JSC Mezhdunadrodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) [145] (Birss J).

20 (2008) 238 CLR 516, 531-2 [35]-[6] (Gleeson CJ, Gummow and Crennan JJ). Kirby J emphasised, 560 [136] the necessity of proving intentional deception. See also *Equuscorp Pty Ltd v Glengallan Investments* (2004) 218 CLR 471, 486 [46] (Gleeson CJ, McHugh, Kirby, Hayne & Callinan JJ).

The academic literature on the application of the sham doctrine to trusts is substantial. Some writers doubt the applicability of the sham doctrine to express trusts, arguing that trust law's certainty and formality rules are, subject to the application of statutory and general law policy (such as the prohibition of perpetuitous dispositions), conclusive as to the validity of an express trust.[21] Case law assumes that the sham doctrine can apply to trusts, even if the cases invalidating trusts on this ground are few and far between.[22] Rather more common are shams relating not simply to the creation of a trust, but to the creation of a trust assuming a special legal character. An Australian example is a trust formally structured as a self-managed superannuation trust, in order to secure the taxation benefits accruing to such trusts, but which in substance operates as a fixed trust for family beneficiaries.[23] Relatedly, although a trust deed may not be sham, documents evidencing dealings undertaken by trustees in acquiring or disposing of trust assets may be shams if they present a false front of dealings which did not occur.[24]

Like Ong, I accept that the sham doctrine applies to trusts. It is hard to discern why the doctrine should apply to contracts and mortgages, which have their own constitutive rules (including rules designed to promote conceptual certainty), but, uniquely among private law concepts, not to express trusts. It must be conceded, however, that many so-called sham trusts are invalid, not because they manifest an intention to deceive, but for some other reason, such as absence of intention to create a trust[25] or because the settlor's aim in creating the trust was to defraud creditors.[26]

An alternative approach to shamming would confine the doctrine to bilateral transactions, so that no arrangement will constitute a sham unless a 'common intention', shared by two or more parties, to deceive can be ascertained.[27] Diplock LJ's dictum in *Snook,* set out above, supports the limitation to multiple participants. Restricting the sham doctrine to bilateral arrangements would remove the trust recognised in *Byrnes v Kendle* from the scope of the doctrine, even if Mr Kendle

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21 For different analyses of this issue see Jessica Palmer, 'Dealing with the Emerging Popularity of Sham Trusts' [2007] *New Zealand Law Review* 81; Conaglen (n 14); BoHao (Steven) Li 'There is No Such Thing as a Sham Trust' (2013) 44(1) *Victoria University Law Review* 113; Ying Liew, 'Sham Trusts and Ascertaining Intentions to Create a Trust' (2018) 12(3) *Journal of Equity* 237.

22 *Midland Bank plc v Wyatt* [1995] 1 FLR 697; *Painter v Hutchinson* [2007] EWCA Civ 758 (Ch); *Hyhonie Holdings Pty Ltd v Leroy* [2003] NSWSC 520 [17]; *Official Assignee v Wilson* [2008] 3 NZLR 45 [51] (Court of Appeal of New Zealand).

23 Cf *Nicols v Manietta* [2022] FCA 39 [75] (sham in the operation, as opposed to creation of trust); *Coshott v Prentice* (2014) 221 FCR 450.

24 *Coshott v Prentice* (2014) 221 FCR 450.

25 *Hyhonie Holdings Pty Ltd v Leroy* [2004] NSWCA 72.

26 *Fairfield Pastoral Holdings Pty Ltd v Ridge Estate Pty Ltd (No 4)* [2022] FCA 1, [330].

27 Derwent Coshott, 'The Sham Doctrine and Intention: Addressing the Bilateral Nature of Sham Trusts' (2022) 138 (January) *Law Quarterly Review* 114. But see Conaglen (n14), 189.

could be shown to have possessed the requisite intent to deceive when he signed the deed of acknowledgement. But there is no obvious reason of legal logic or policy for including trusts created by transfer of rights in property to purported trustees within the ambit of the sham doctrine while excluding self-declared trusts of the settlor's own property. They are simply different methods of employing a trust in order to present a false picture of beneficial ownership. If the prevention of deception is the policy objective of the sham doctrine, a distinction between unilateral and bilateral legal arrangements is hard to justify. Diplock LJ's reference to the necessity of a 'common intention' must be understood in its particular context, namely an argument concerning the genuineness of a bilateral hire-purchase contract.[28] The principle that evidence of subjective intention is admissible to establish a sham does not mean that assertions made by the individual declaring a purported trust of her own property as to the 'real' meaning of the declaration have to be taken at face value. The evidence of the declarant's subjective intention will be tested against all other evidence available to the court, as well as the court's assessment of the declarant's credibility, in determining whether the intention was genuinely held. [29] Moreover, the weight of authority assumes that the sham doctrine applies to self-declared trusts, even if courts exhibit an understandable reluctance to characterise a trust declarant as dishonest.[30]

On the assumption that the sham doctrine can be applied to a settlor's declaration of trust of her own property, Mr Kendle's deed was not a sham declaration of trust. We have seen that Ong reached this conclusion by drawing a difficult, if conceptually defensible, distinction between subjectively not having intended to create a trust (justifying a finding of a sham if the requisite intention to deceive is established) and not having subjectively intended to create a trust (justifying a finding of an express trust if the objective construction of the deed supports the finding). But there is no need to resort to this kind of semantic subtlety in order to prove that the trust created in *Byrnes v Kendle* was genuine. The facts of the case spoke more simply against sham.

There was no evidence that Mr Kendle intended to practise deception when he signed the deed of acknowledgement. His evidence, accepted by the trial judge, was that he acknowledged Mrs Byrnes's entitlement to half the proceeds of sale of the property because she had

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28 Cf *CIFG (Australia) Pty Ltd v Perna* [2020] VSC 630 (sham loan contract based on bilateral intention).

29 In this respect there is an analogy to the doctrine of rectification which also lets in evidence of subjective intention. See *Simic v New South Wales Land & Housing Corporation* (2016) 260 CLR 85, 117 [104] (Gageler, Nettle and Gordon JJ) where, in the context of rectification of a contract, it was stated that the 'actual or true common intention of the parties…must at least be the parties' actual intentions, viewed objectively from their words or actions, and must be correspondingly held by each party'. In other words, even a subjective intention must be objectively proved, and not simply asserted.

30 See cases cited in n 22.

contributed to the purchase price of previous properties they had bought. Furthermore, title to the disputed property was only placed in his name because he was able to obtain a government loan on favourable interest terms under the *Defence Services Homes Act 1918* (Cth).[31] This evidence was rightly held inadmissible to contradict Mr Kendle's signed admission in the deed that he was a trustee. But if a question had arisen later as to whether the deed was a sham, thereby permitting evidence of subjective intention to be adduced, the conclusion to be drawn from the history of how the deed came to be signed would surely have been that Mr Kendle was mistaken but not dishonest. Applying *Raftland*, Mr Kendle was not guilty of any 'deliberate deception' that would have justified invalidating the trust as a sham.[32]

IV The Characterisation Question

Suppose that a deed adopts the terminology of trust, complies with the certainty rules for trust creation, satisfies all relevant formalities, is not offensive to general law or statutory policy, and is not a sham. Can we conclude that the arrangement created by the deed is inevitably a trust? The answer is that we cannot. This is because a close analysis of the legal rights and duties created by the deed may reveal that they are in fact inconsistent with the rights and duties arising under a trust, even if the parties to the deed did not intend to engage in deception. Furthermore, those rights and duties may be consistent with some other legal arrangement, such as the retention of beneficial ownership or the creation of a charge over the putative trust property. The process of drawing the correct conclusion from the analysis of the rights and duties created by a legal document intended to have legal effect, or from the circumstances alleged to give rise to the imposition of legal rights and duties, is an exercise in characterising the legal arrangement in question.[33]

Characterisation logically follows the ascertainment of a settlor's intention. The question will be whether the rights and duties created by that expression of intention are consistent with the allocation of rights and duties between a trustee and beneficiary. The question cannot be answered solely by the application of techniques of construction. Policy, particularly statutory policy, is a relevant consideration.

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31 *Byrnes v Kendle* [2009] SADC 36, [8], [12]. Manipulating registered title with the aim of obtaining a low interest loan under the *Defence Services Homes Act* has created problems elsewhere in the law of trusts: *Nelson v Nelson* (1995) 184 CLR 538.

32 Pey-Woan Lee, 'Form, Substance and Recharacterisation' in, Andrew Robertson & James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 71.

33 New Zealand decisions have recognised the category of illusory trust: see *Clayton v Clayton* [2016] 1 NZLR 551, [118]-[127] (O'Regan J) (Supreme Court of New Zealand). In this author's view, 'illusory trust' is another name for the methodology of characterising an arrangement which purports to be a trust. See also Pey-Woan Lee (n 32), 86-7.

In *Trusts Law in Australia* Denis Ong discussed one instance of trust characterisation. A settlor who has an unfettered power of revocation of a trust has a right which, for most practical purposes, is tantamount to ownership of the trust property.[34] During the lifetime of the settlor when the power of revocation is exercisable, a court will deem the settlor to be the absolute owner of the property, for example for the purpose of enabling the property to be applied to meet a debt owed to the settlor's judgment creditor.

Characterisation questions are not confined to the law of trusts. They frequently arise in connection with the taking of security.[35] All good trusts textbooks, including Ong's, include a chapter differentiating the express trust from related concepts.[36] The judicial method applied when a characterisation question arises was explained by Lord Millett, in the context of distinguishing between fixed and floating charges.

> [T]he court is engaged in a two-stage process. At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it.[37]

Characterisation of the rights and duties the parties have in law created in a legally dispositive instrument occurs at the second stage of the process outlined by Lord Millett.

Applying the two-stage process is not always straightforward, and different judicial minds can reach different conclusions as to the correct characterisation of a given legal arrangement. For example, the principal issue before the High Court of Australia in the *Associated Alloys* case[38] was whether a trust created as part of a retention of title

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34 *TLIA* (n 1) 110, discussing *TMSF v Merrill Lynch Bank & Trust Co Ltd* [2012] 1 WLR 1721 (Privy Council), [28] (Lord Collins). Cf *Clayton v Clayton* [2016] 1 NZLR 551, 569 [48] (O'Regan J) (Supreme Court of New Zealand). In *Clayton v Clayton* the right of revocation was not unfettered.

35 An example is the characterisation of charges as either fixed or floating: *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 (Privy Council); *National Westminster Bank plc v Spectrum Plus Ltd* [2005] 2 AC 680 (House of Lords). See now *Personal Property Securities Act 2009* (Cth) ss 19, 32.

36 *TLIA* (n 1) ch 2, 'The Trust Compared with Some Other Concepts'.

37 *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28; [2001] 2 AC 710 (Privy Council), [32] (Lord Millett).

38 *Associated Alloys v ACN 001452106 Pty Ltd* (2000) 202 CLR 588 ('*Associated Alloys v ACN*').

clause, and which defined the subject-matter of the trust as being the proceeds of sale of products containing the seller's steel, but limited to the amount owing by the buyer to the seller at the time the proceeds were received, constituted a charge. If it was a charge, it was void for non-registration. Conversely, if the arrangement was in substance a trust, it was not registrable as a company charge. A majority of the High Court characterised the arrangement as a valid trust.[39] Kirby J, dissenting, held that a registrable charge had been created in spite of the fact that the essential criteria for the creation of a trust, including the certainty requirements, were satisfied. He cautioned against the 'exclusive concentration on the terms of an instrument purporting to create a trust, to the neglect of an examination of the purpose and effect of the instrument when considered for its substance, not merely its form.'[40] The Commonwealth legislature subsequently vindicated Kirby J's dissent when it enacted the *Personal Property Securities Act 2009* (Cth) by defining a security interest to include a retention of title clause if it 'in substance secures payment or performance of an obligation'.[41]

A number of recent decisions have considered whether a purported trust instrument conferring extensive powers on an individual in several capacities (settlor[42], trustee or director of trustee company, beneficiary, as well as a third party holding controlling positions variously designated as protector, appointor, consultant or 'Principal Family Member') and being entitled in one or more of these capacities to appoint the trust property to himself and to apply the trust capital and income for his own benefit, can properly be designated a trust.[43] The characterisation problem to which these 'massively discretionary trusts' give rise is whether the rights possessed by the settlor are consistent

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39 The seller's claim nevertheless failed on evidential grounds: the seller could not establish whether the buyer had received proceeds of sale of products incorporating the seller's steel in its capacity as trustee under the proceeds sub-clause, or for its own benefit: *Associated Alloys v ACN* (n 38) 613 [54].

40 *Associated Alloys v ACN* (n 38) 625 [92] (Kirby J).

41 *Personal Property Securities Act 2009* (Cth) s 12(d). See also s 32(1) creating a statutory right to proceeds. Ong took a dim view of both *Associated Alloys* for implying an 'incongruous', implied term into the sales contract, and the *Personal Property Securities Act* for failing to define the terms 'secures' and 'in substance' in the Act: '[t]hese significant omissions are apt to catapult that critically definitive phrase into controversy': see *TLIA* (n 1) 48-9. But he made no reference to the extensive Canadian and New Zealand caselaw on the PPSA terms, which arguably reduce the area of controversy.

42 The trust may be constituted by a nominal settlor who constitutes the trust by settling a nominal sum. In *Webb v Webb* [2020] UKPC 22 (Privy Council) ('*Webb v Webb*') the Webb Family Trust was constituted by a business colleague of Mr Webb who settled NZ $10 on trust. The Privy Council held at [88] that the Cook Islands Court of Appeal had been right to ignore the interposition of a nominal settlor, identifying Mr Webb as the 'real' settlor of the trust.

43 *Clayton v Clayton* [2016] 1 NZLR 551(Supreme Court of New Zealand); *JSC Mezhdunarodniy Bank v Pugachev* [2017] EWHC 1847 (Ch) (Birss J); *Webb v Webb* (n 42). Common to all three cases, emanating from different jurisdictions, is the fact that the trust instruments were drafted by specialist New Zealand trust practitioners. See also Lionel Smith, 'Massively Discretionary Trusts' (2017) 70(1) *Current Legal Problems* 17.

with the creation of a valid express trust, or whether the congeries of powers amounts to nothing more than the settlor's' retention of beneficial ownership.

The characterisation process is illustrated by the recent decision of the Privy Council in *Webb v Webb*.[44] Mr Webb, a New Zealand citizen, created two trusts governed by the law of the Cook Islands, where he had acquired property and lived for a time. He established two family trusts, the Arorangi Trust and the Webb Family Trust. Under the Arorangi trust, on which the Privy Council principally focused, Mr Webb was appointed sole trustee, holding property for himself and for his son. The trust deed provided for the appointment of a Consultant who enjoyed extensive powers. They included the power, without giving reasons, to remove the trustee and to appoint a replacement, to request the early vesting of trust property, and to consent to a variation of the trust. Mr Webb appointed himself as Consultant. Separately, the deed conferred on Mr Webb, in his capacity as settlor (and therefore not subject to fiduciary control) the power to nominate himself as sole beneficiary. The trust deed also empowered Mr Webb to exercise all powers conferred on him by the trust without regard to whether the exercise created a conflict of interest. Finally, the deed empowered Mr Webb to apply the whole capital and income of the trust for his own benefit although the Privy Council, disagreeing with the Court of Appeal on the point, held that the exercise of this power was subject to fiduciary regulation.[45]

After his marriage had broken up Mrs Webb issued proceedings under Cook Islands family law legislation for a division of the matrimonial property. The ensuing litigation in the Cook Islands courts raised a number of trusts law and non-trusts law issues which eventually reached the Privy Council for resolution. The Privy Council did not disturb the ruling of the trial judge that the trusts were not shams. The trusts were not 'a pretence, that is to say a screen which would conceal [Mr Webb's] personal use of the trust assets.'[46] Nevertheless, a majority of the Privy Council held that Mr Webb 'can be regarded as having had rights in the trust assets which were indistinguishable from ownership.'[47]

Lord Kitchin, delivering the majority judgment, identified two approaches to determining whether Mr Webb was the effective owner

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44 *Webb v Webb* (n 42).

45 Ibid [84].

46 Ibid [91] (Lord Kitchin).

47 *Webb v Webb* (n 42) [89] (Lord Kitchin). Lord Wilson dissented on the separate question whether a tax debt owed by Mr Webb in New Zealand was enforceable in the Cook Islands. If enforced and brought into account in the matrimonial property division proceedings (as he considered it should be), it would have left no property to divide between the spouses. But he agreed at [111] with Lord Kitchin's analysis of the trusts.

of property he had purported to settle on trust.[48] One focused on the disposition of the property settled on trust. Mr Webb had never effectively disposed of his property to the trusts he had constituted, in view of the extensive powers he possessed to assert beneficial interests over the property. From this perspective, a relevant inquiry was whether the trusts lacked the 'irreducible core of obligations owed by trustees to beneficiaries.'[49] The second approach, which is perhaps no more than the mirror image of the first, is to focus on the powers reserved to Mr Webb. They were so extensive, and -insofar as he held some of them in his non-fiduciary capacity of settlor- so uncontrolled that in equity he had rights which were 'tantamount to ownership.' On this ground '[t]he bundle of rights which he retained is indistinguishable from ownership.'[50]

When a purported trust is judicially characterised as retention of beneficial ownership, it is not uncommon for a judge to conclude, as Lord Kitchin did, that the rights retained are 'tantamount to ownership.'. In *TMSF v Merrill Lynch Bank & Trust Co Ltd,* Lord Collins also observed that a settlor's unfettered power to revoke a trust was 'for most practical purposes, tantamount to ownership.'[51] It is important to note, as Ong did in his discussion of the *TMSF* case, that 'tantamount to ownership' is not the same as ownership. In the case of the unfettered power of revocation, the difference between ownership and 'tantamount to ownership' becomes apparent if the settlor dies without having exercised the right. The right to revoke ceases to be exercisable; it is not property that passes under the settlor's will or upon her intestacy.[52] It is in this type of case that a judge must bear in mind the observation of a distinguished equity lawyer that '[n]o two ideas can well be more distinct the one from the other than those of "property" and "power"'.[53]

The distinction between 'property' (or right) and 'power' is analytically clear.[54] But if an individual holds an aggregation of powers affecting the disposition of property, correct characterisation requires an analysis of the effect of the exercise of the totality of powers, even if they have not been exercised. The inquiry in such a case will be functional, not formal.[55] The vesting of a collection of discrete powers

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48 *Webb v Webb* (n 42) [89] (Lord Kitchin).

49 Quoting *Armitage v Nurse* [1998] Ch 241, 253-4 (Millett LJ). Ong disagreed with Millett LJ's conception of 'irreducible core' insofar as it purported to limit the 'irreducible core' of trusteeship to the duty of honesty, although he acknowledged that the conception had been accepted in *Segelov v Ernst & Young Services Pty Ltd* (2015) 89 NSWLR 431, 458 [145] (Gleeson JA). See *TLIA* (n 1) 247-9.

50 *Webb v Webb* (n 48) [89] (Lord Kitchin).

51 [2012] 1 WLR 1721,1728 [28] (Lord Collins) (Privy Council) (' *TMSF*').

52 *TLIA* (n 1) 111. See also *Kennon v Spry* (2008) 238 CLR 366, 426-7 [176] (Heydon J), noting that for the same reason a general power of appointment is not property.

53 *Ex parte Gilchrist; in re Armstrong* (1886) 17 QBD 521, 531 (Fry LJ).

54 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (Yale University Press, 1919) 50-58.

55 Lee (n 32) 86-8.

to dispose of trust property in one individual can legitimately be described as 'indistinguishable from ownership' if (1) dispositive (i.e non-managerial) powers are not subject to fiduciary control, and (2) they include the power to remove existing beneficiaries and to appoint new beneficiaries so as to control the destination of the trust property both during the individual's lifetime and after the individual's death. The critical considerations are both the accumulation of dispositive powers in the hands of an individual and the absence of fiduciary or other regulatory control of their exercise. In combination the considerations satisfy Honoré's celebrated definition of ownership as being 'the greatest possible interest in a thing which a mature system of law recognizes'.[56]

Recognizing that the vesting of unconstrained powers to dispose of property in the hands of an individual constitutes ownership is particularly relevant in a statutory context, such as the application of matrimonial property legislation, where the policy informing the statute favours a functional interpretation of the concept of property.[57] Such was evidently the case in *Webb v Webb*.[58]

V CONCLUSION

Distinguishing genuine trusts from counterfeits resembles, in some respects, the pleasurable but occasionally frustrating avocation of collecting works of art: it is not always easy to distinguish authentic works from forgeries, or from works which, often honestly, have been wrongly attributed. The techniques employed by courts to identify shams and mischaracterised trusts do not call for the advanced X-ray technology nowadays applied to distinguish a genuine Rembrandt from an imitation, but they have their own intellectual sophistication, as this paper has tried to show.

Denis Ong was not given to grandiloquent ruminations about the genius of Australian equity, or to high-flown generalisations on the uniqueness of the trust in common law systems. The introductory chapter of *Trusts Law in Australia* is severely practical, bundling together a condensed account of the early history of equity, a basic description of the express trust, together with a few sentences introducing the distinction between express, resulting and constructive trusts. The book does not purport to be anything other than it is, namely a text which sets out clearly the principles of trusts law, and which

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56 A M Honoré, 'Ownership' in A G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107.

57 Cf *Kennon v Spry* (2008) 238 CLR 366, 390 [64] (French CJ): the word 'property' in s 79 of the *Family Law Act 1975* (Cth) 'is to be read widely and conformably with the purposes of the Family Law Act.'; also 396-7 [89] (Gummow and Hayne JJ); *Clayton v Clayton* [2016] 1 NZLR 551, [38] (O'Regan J) (Supreme Court of New Zealand).

58 *Webb v Webb* (n 42).

encourages the student to read and examine closely the reasoning employed in the leading cases. There is no pretence. It is assuredly not a sham, nor does the title mischaracterise the book's contents. It is part of his intellectual legacy: a genuinely reliable and instructive trusts textbook from which all Australian law students, and their teachers, can learn.